

1 Thomas H. Bienert, Jr. (CA 135311, admitted *pro hac vice*)
2 Whitney Z. Bernstein (CA 304917, admitted *pro hac vice*)
3 BIENERT | KATZMAN PC
4 903 Calle Amanecer, Suite 350
5 San Clemente, California 92673
6 Telephone: (949) 369-3700
7 Facsimile: (949)369-3701
8 tbienert@bienertkatzman.com
9 wbernstein@bienartkatzman.com
10 *Attorneys for James Larkin*

11 Paul J. Cambria, Jr. (NY 1430909, admitted *pro hac vice*)
12 Erin E. McCampbell (NY 4480166, admitted *pro hac vice*)
13 LIPSITZ GREEN SCIME CAMBRIA LLP
14 42 Delaware Avenue, Suite 120
15 Buffalo, New York 14202
16 Telephone: (716) 849-1333
17 Facsimile: (716) 855-1580
18 pcambria@lglaw.com
19 emccampbell@lglaw.com
20 *Attorneys for Michael Lacey*

21
22
23
24
25
26
27
28
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiff,

vs.

Michael Lacey, *et al.*,

Defendants.

NO. CR-18-00422-PHX-SMB

**MR. LARKIN AND MR. LACEY'S
REPLY IN FURTHER SUPPORT OF
THEIR MOTION TO COMPEL
COMPLIANCE (DOC. 665)**

Defendants Michael Lacey and James Larkin, by and through their undersigned attorneys, hereby file the instant reply in further support of their Motion to Compel Compliance and Order to Show Cause Regarding the Government's Violation of the Court's Scheduling Order ("Motion") (Doc. 665). The government's opposition, submitted under seal

1 (“Opposition”) (Doc. 704), has provided no reasons to deny the Motion and, in fact, further
2 illustrates the government’s rules-don’t-apply-to-me litigation approach which has permeated
3 its actions with Defendants.

4 The government does not dispute that it was obligated, under an order from this Court
5 (“Order”) (Doc. 535), to disclose the Jencks Act and impeachment materials relative to its key
6 witness, Carl Ferrer, no later than June 25, 2019. The government does not dispute that it alone
7 decided that it would not comply with that Order. The government has offered no apology or
8 excuse for its unilateral decision to ignore the Order. Nor does it offer any explanation for why
9 it failed to move for an extension of its deadline—a simple pleading that would have preserved
10 the government’s objection to the deadline and, at the same time, accorded respect to this Court’s
11 order.¹

12 Instead, the government has offered two flawed justifications which it apparently hopes
13 will motivate this Court (without actually asking for it) to give the government a free pass on its
14 violation. First, the government claims that its unilateral decision to violate the Order should be
15 forgiven due to its suspicion of an “apparent” violation of a separate order by Mr. Larkin and
16 Mr. Lacey. But the government’s suspicions in no way justify its violation of the Court’s order,
17 and the government fails to explain otherwise. More importantly, as asserted in the Opposition
18 to Sanctions filed under seal by Mr. Larkin and Mr. Lacey (Doc. 672), incorporated herein by
19 reference, the government has no proof that such a violation occurred. Instead, the government’s
20 unilateral decision to violate this Court’s Order is based on its speculation about what the
21 government has itself conceded is no more than an “apparent” or “likely” violation. (Opp’n at
22 8.) Regardless of the “apparent” violation, as an alternative to ignoring the Order, the
23 government could have moved for a limited extension of its disclosure deadline pending
24 resolution of this Court’s ruling on the Motion for Sanctions. It certainly could have made this
25 request orally at the status conference that this Court held *one day before* its deadline, particularly
26

27 ¹ In contrast, every time that Defendants have determined that they needed an extension of
28 a deadline, they have moved for such relief, provided this Court with the basis for the request,
and complied with this Court’s ruling, whether granting or denying the request.

1 because this Court held that status conference to address scheduling matters and the government
2 presumably knew of its intended forthcoming violation the very next day. (*See* Doc. 656.) The
3 government’s failure to make such a request while standing before this Court during a discussion
4 on scheduling (or through a written submission) is troubling, particularly because the
5 government had notice of the “apparent” violation that would become the justification for its
6 violation of the Order long before the June 24, 2019 appearance and before its June 25, 2019
7 disclosure deadline.

8 Second, the government claims that its unilateral decision to violate the Order should be
9 forgiven because Defendants will not be prejudiced by the one-sided, extra-judicial amendment
10 to the discovery schedule the government has proposed. This after-the-fact justification for its
11 violation is flawed for many reasons. The Jencks Act material at issue in this case is exceptional
12 and the failure to provide it at the time specified in the Order is highly prejudicial to Defendants.
13 This is a novel case involving the prosecution of former website owners for their purported
14 involvement in the publication of third-party speech. This prosecution is all the more unique
15 because voluminous discovery has been disclosed and remains undisclosed (and in the case of
16 functional server data, voluminous, critical discovery has been destroyed), and because of the
17 government’s unprecedented, aggressive, and unconstitutional wholesale seizure of Defendants’
18 assets (including substantial wealth earned decades before the relevant period identified in the
19 indictment with no showing that such assets are traceable to any of the crimes charged). But this
20 prosecution is exceptional for another significant reason—it is built on the cooperation of Carl
21 Ferrer, the former Chief Executive Officer of Backpage.com, LLC, who spent more than a
22 decade making public statements and statements under oath about the lawful nature of
23 Backpage’s operations. Defendants cannot fathom how to defend the instant charges without
24 access to the full body of Ferrer’s statements, particularly those made to law enforcement as part
25 of his cooperation in this case because those statements are at odds with everything Ferrer has
26 said in the past and are the basis upon which the government ultimately brought charges against
27 Mr. Larkin and Mr. Lacey.

1 The importance of the Ferrer Jencks Act and impeachment material to this exceptional
2 case has not been lost on this Court or the government. The first scheduling order issued by the
3 Court recognized that this was not a typical case to be governed by typical deadlines and, among
4 other things, ordered the disclosure of Jencks Act and impeachment materials nearly eleven
5 months before trial—a date that reflects the significance of the Jencks and impeachment material
6 to Defendants’ preparation of their defense. (See Doc. 131.) The trial date in this case was set
7 with a common understanding that Defendants would have sufficient time to review the Jencks
8 and impeachment materials, conduct follow-up investigation, and tailor their defense
9 accordingly. The government already upset that schedule by seeking an *ex parte* extension of
10 the Jencks and impeachment deadline for Ferrer—resulting in that date being pushed back by
11 four months. By ignoring the already extended deadline and helping itself to a further extension,
12 the government’s actions are both remarkable and hypocritical, given that it continually
13 demands that Defendants be held to the deadlines in the Order and vehemently opposes
14 Defendants’ requests for continuances. The Court should not countenance the government
15 picking and choosing the deadlines with which it will comply—particularly when the
16 government chooses to ignore a deadline and Order that materially impact Defendants’ ability
17 to prepare for trial.

18 Finally, the government’s weakest after-the-fact justification for its unilateral decision to
19 ignore the Order is the government’s claim of the need to protect Ferrer from intimidation. It is
20 unclear how the disclosure of his statements would somehow trigger a first-time interest in
21 intimidating Ferrer because Defendants and their counsel have understood that the government’s
22 case was founded on his statements since the beginning of this prosecution in April 2018 and
23 have had no contact with him. This attempt to tarnish Defendants and their counsel is unseemly,
24 offensive, baseless, and divorced from the reality of the history of this case.

25 It is widely agreed that counsel for the federal government should aspire to hold itself to
26 a highest ideals of the legal profession. *See United States v. Young*, 470 U.S. 1, 25 (1985)
27 (Brennan, J., concurring) (“[W]e have long emphasized that a representative of the United States
28

Government is held to a *higher* standard of behavior.” (emphasis in original)); *United States v. Aldridge*, 985 F.2d 960, 962 (8th Cir. 1993) (“[W]e hold prosecutors to a high standard of performance.”); *see also United States v. Moore*, 2016 WL 5340649, at *2 (E.D. Cal. Sept. 23, 2016) (“This Court admittedly holds federal prosecutors to a higher standard than the usual litigant and expects them to follow through on their promises.”). The decision to ignore a court order and the demonstrably flawed after-the-fact justifications for such a decision are improper tactics for any litigant, especially the federal government.

CONCLUSION

For all these reasons, Lacey and Larkin respectfully request that this Court grant their Motion.

Dated: July 26, 2019

BIENERT | KATZMAN PC

/s/ Thomas H. Bienert, Jr.
Thomas H. Bienert, Jr.
Whitney Z. Bernstein
Attorneys for James Larkin

LIPSITZ GREEN SCIME CAMBRIA LLP

/s/ Paul J. Cambria, Jr.
Paul J. Cambria, Jr.
Erin McCampbell Paris
Attorneys for Michael Lacey

CERTIFICATE OF SERVICE

I certify that on this 26th day of July 2019, I electronically transmitted a PDF version of this document to the Clerk of the Court, using the CM/ECF System, for filing and for transmittal of a Notice of Electronic Filing to the following CM/ECF registrants listed below.

/s/ Whitney Z. Bernstein

Whitney Z. Bernstein

Anne Michelle Chapman, anne@mscclaw.com
Erin E. McCampbell, emccampbell@lglaw.com
Anthony R. Bisconti, tbisconti@bienertkatzman.com
Ariel A. Neuman, aan@birdmarella.com
Bruce S. Feder, bf@federlawpa.com
James C. Grant, jimgrant@dwt.com
Lee David Stein, lee@mscclaw.com
Paul J. Cambria, pcambria@lglaw.com
Robert Corn-Revere, bobcornever@dwt.com
Ronald Gary London, ronnielondon@dwt.com
Janey Henze Cook, janey@henzecoockmurphy.com
John Lewis Littrell, jlittrell@bmkattorneys.com
Seetha Ramachandran, Seetha.Ramachandran@srz.com
Thomas H. Bienert, Jr. tbienert@bienertkatzman.com
Whitney Z. Bernstein, wbernstein@bienertkatzman.com
Gary S. Lincenberg, glincenberg@birdmarella.com
Gopi K. Panchapakesan, gpanchapakesan@birdmarella.com
Michael D. Kimerer, mdk@kimerer.com
Rhonda Elaine Neff, rneff@kimerer.com
David S. Eisenberg, david@deisenbergplc.com
Joy Malby Bertrand, joyous@mailbag.com
John Jacob Kucera, john.kucera@usdoj.gov
Kevin M. Rapp, Kevin.Rapp@usdoj.com
Margaret Wu Perlmeter, Margaret.perlmeter@usdoj.gov
Reginald E. Jones, reginald.jones4@usdoj.gov
Peter Shawn Kozinets, Peter.Kozinets@usdoj.gov
Andrew C. Stone, andrew.stone@usdoj.gov